8-98-0642 S.C. v. Sullivan-Schein Dental Co. Issued: 5/31/05

Sullivan-Schein Dental Co. ("Sullivan-Schein" hereafter) asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge La Jeunesse's determination that Sullivan-Schein engaged in employment-related retaliation against S. C. in violation of the Utah Antidiscrimination Act ("the Act"; Title 34A, Chapter 5, Utah Code Annotated).

The Appeals Board exercises jurisdiction pursuant to Utah Code Ann. §63-46b-12 and Utah Code Ann. §34A-5-107(11).

BACKGROUND AND ISSUES PRESENTED

In a decision issued on January 7, 2004, Judge La Jeunesse found that Sullivan-Schein terminated Ms. C.'s employment in retaliation for Ms. C.'s complaint of gender-based discrimination and inappropriate sexual comments against two co-workers. Judge La Jeunesse concluded that Sullivan-Schein's action violated the Act's prohibition against retaliation and, therefore, awarded damages of $191,649.72, plus interest, to Ms. C. Sullivan-Schein then filed a timely request for Appeals Board review of Judge La Jeunesse's decision. In summary, Sullivan-Schein contends the evidence does not support Judge La Jeunesse's finding of retaliatory termination. Alternatively, Sullivan-Schein contends Judge La Jeunesse erred in computing Ms. C.'s damages.

FINDINGS OF FACT

The Appeals Board sets aside Judge La Jeunesse's findings of fact and enters the following findings.

Between November 1992 and August 1993, Ms. C. worked as a sales representative in the Salt Lake area for Mountain West Dental, where she was supervised by Parke Simmons and Blaine Brown. Ms. C. was discharged by Mountain West and subsequently went to work as a sales representative for another local dental supply company. Then, in March 1997, she was hired as a sales representative for the Salt Lake area by Henry Schein, Inc., a large multi-state dental supply company.

During this same time period, Mountain West Dental was acquired by another large multi-state dental supply company, Sullivan Dental Products. In the course of this acquisition, Mr. Simmons and Mr. Brown became employees of Sullivan Dental Products.

During late 1997, Sullivan Dental Products and Henry Schein, Inc. announced their merger into Sullivan-Schein Dental Co. This meant that these two companies, formerly competitors, would consolidate their operations into one entity. Ms. C., Mr. Simmons and Mr. Brown would once again be working together, this time as employees of Sullivan-Schein.

Even though Mr. Simmons and Mr. Brown would have no supervisory authority over Ms. C. in the new Sullivan-Schein organization, Ms. C. was concerned with the prospect of once again working with the two men. On December 14, 1997, she faxed a letter to Henry Schein management alleging that when she had worked for Mr. Simmons and Mr. Brown several years earlier they had

treated her less favorably than male employees and had made inappropriate gender-based comments to her. Ms. C.'s letter stated that she would be uncomfortable working in the same office as Mr. Simmons and Mr. Brown. Ms. C. asked that she, and presumably other sales staff, be provided a neutral space in a separate location.

Sullivan-Schein executives reviewed Ms. C.'s letter and promptly counseled Mr. Brown and Mr. Simmons against any inappropriate conduct, comments, or retaliation against Ms. C..

In the meantime, the merger of Sullivan Dental Products and Henry Schein, Inc. continued. Each company had previously maintained its own sales force. In Salt Lake and other areas, these sales forces overlapped. Consequently, sales representatives from Sullivan Dental Products and from Henry Schein, Inc., who had previously been competitors, were now colleagues. In many instances, these sales representatives had previously called on the same dentists and dental labs.

The situation where more than one of Sullivan-Schein's sales representatives might call on a customer (commonly referred to as "crossover") presented serious challenges to the success of the Sullivan-Schein merger. It bred distrust and dissension in the sales force. It was contrary to efficiency and good customer relations. Furthermore, other dental supply companies were ready to hire Sullivan-Schein's best sales representatives if those representatives became dissatisfied at Sullivan-Schein.

To minimize the crossover problem, Sullivan-Schein began a process of identifying each sales representative's accounts. In cases where only one representative had been servicing an account, that representative retained the account. If more than one representative had been servicing an account, the account was assigned to the representative with the highest sales to the account. But if a customer expressed a preference for a particular sales representative, the account was assigned to that sales representative. In conjunction with this process of identifying accounts, two rules were emphasized by Sullivan-Schein management and by the sales representatives themselves. First, no sales representative should have dealings with customers assigned to another sales representative. Second, no sales representative should solicit a customer to express a preference for that representative. This last rule was referred to as "soliciting loyalty."

After the merger, the Sullivan-Schein sales force in the Salt Lake area consisted of seven sales representatives, including Ms. C., Melanie Roylance and Mike Butler. They were supervised by Joseph Schuetzow, Sullivan-Schein's regional sales manager in Seattle. Mr. Schuetzow received at least three complaints that Ms. C. had violated Sullivan-Schein's rules of conduct for sales representatives.

The first complaint came from Mike Butler. Mr. Butler's largest and longest established customer was Dr. Brooks. Mr. Butler began receiving complaints from Dr. Brooks that Ms. C. was insisting that she, rather than Mr. Butler, was now Dr. Brooks' sales representative. Mr. Butler complained of Ms. C.'s conduct to Mr. Schuetzow.

The second complaint came from Melanie Roylance. Prior to the Sullivan-Schein merger, Ms. Roylance sold dental supplies to Dr. Clegg on behalf of Sullivan Dental Products while Ms. C. serviced the Clegg account for Henry Schein, Inc. After the merger, the Clegg account was assigned to Ms. Roylance. During February 1998, Ms. C. spoke with Dr. Clegg and a staff member regarding

the manner in which Dr. Clegg's orders should be in placed in order to obtain lowest prices. Ms. Roylance heard of these contacts between Ms. C. and Dr. Clegg and "vented" her displeasure to Mr. Simmons and/or Mr. Brown, who directed her to her supervisor, Mr. Schuetzow. Mr. Schuetzow passed Ms. Roylance's complaint on to his own supervisor, Mr. Engel. On February 18, 1998, Mr. Engel sent a letter to Ms. C. warning her of possible termination for any future episodes of "soliciting loyalty" from customers.

The third incident involved complaints about Ms. C.'s activities relative to Heritage Dental. Heritage Dental consists of a lab, which maintained its own supply account, and affiliated dentists, who likewise maintained individual supply accounts. Although Ms. C. was the nominal sales representative for the lab, the owner disliked her. Consequently, Ms. C. did not sell to the lab but did make sales calls to the dentists affiliated with, and located at, Heritage Dental.

Mr. Butler was contacted by Heritage Dental lab staff and asked to service the lab account. Mr. Butler called Mr. Schuetzow for instructions and was told that, in light of the customer's request, the account would be assigned to him. Mr. Butler began to make sales calls to the lab. Ms. C. continued to make sales calls to the affiliated dentists. However, Mr. Butler informed Mr. Schuetzow that the owner of the lab was so upset with Ms. C.'s continued presence on the premises that he intended to call the police if Ms. C. returned.

Mr. Schuetzow relayed Mr. Butler's report to Mr. Engle. Mr. Engel discussed the matter with his supervisor, Mr. Stahly. Mr. Schuetzow then received instructions to immediately terminate Ms. C.'s employment, which he did.

DISCUSSION AND CONCLUSIONS OF LAW

As a preliminary matter, the Appeals Board notes Ms. C.'s argument that Sullivan has failed to marshal the evidence in this matter. That argument is misplaced. The requirement to marshal the evidence is an aspect of the appellate judicial review process, where the appellate court is bound to defer to the lower court or agency's findings of fact. The marshalling requirement is not applicable in this proceeding, where the Appeals Board, rather than the ALJ, is the ultimate fact finder.

Turning to the merits of Ms. C.'s retaliation complaint against Sullivan-Schein, §34A-5-106 of the Utah Antidiscrimination Act prohibits an employer from discriminating against an employee who has opposed what the employee believes to be illegal discrimination. Because this provision of Utah law is similar to federal statutes prohibiting retaliation, Utah's appellate courts have found it helpful to follow interpretations of the federal provisions. Viktron/Lika v. Labor Commission, 38 P.3d 993, 995 (Utah App.); Sheikh v. Department of Public Safety, 904 P.2d 1103 (Utah App. 1995); University of Utah v. Industrial Commission, 736 P.2d 630 (Utah 1987). The Appeals Board will therefore consider federal precedent in evaluating Ms. C.'s claim of unlawful retaliation.

In McDonnell Douglas Corp. v. Green, 411 U.S.792 (1973), the United States Supreme Court addressed the parties' burdens of production and the order for presentation of evidence in claims of discrimination that are based on circumstantial evidence. In such cases, the individual alleging discrimination must first establish a prima facie case. The employer must then come forward with a non-discriminatory explanation for its actions. If the employer provides such an explanation, it falls to the trier of fact to decide the ultimate question of whether the employer

intentionally discriminated against the employee for an unlawful reason.

If, in presenting a non-discriminatory explanation for its actions, an employer submits an untruthful explanation, that untruthfulness can itself be evidence of an unlawful discriminatory motive for the employer's actions. In Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000; emphasis added), the United States Supreme Court held: "(A) plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, **may** permit the trier or fact to conclude that the employer unlawfully discriminated." Likewise, in Miller v. EBY Realty Group LLC, Case Nos. 03-3307 and 04-3073, (10th Circuit, January 25, 2005; emphasis added) the 10th Circuit Court of Appeals noted that: "(t)he fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."

Under the foregoing analytical framework, the Appeals Board must first determine whether Ms. C. has established the elements of a prima facie case of unlawful retaliation. In Viktron/Lika v. Labor Commission, 38 P.3d 999, the Utah Court of Appeals identified the elements of a prima facie case of retaliatory discharge as: 1) protected opposition to discrimination; 2) adverse action by the employer subsequent to the protected activity; and 3) a causal connection between the employee's activity and the adverse action. There is no dispute that Ms. C.'s letter of December 14, 1997, constituted protected opposition to discrimination, thereby satisfying the first element of Ms. C.'s prima facie case. As to the second element, Sullivan-Schein's letter to Ms. C. on February 18, 1998, may be viewed as "adverse action" and Ms. C.'s termination on March 28, 1998, clearly satisfies that requirement. Thus, the first two elements of a prima facie claim of retaliatory discharge have been established and the Appeals Board turns to the final element of Ms. C.'s prima facie case, the requirement that a causal connection exist between her complaint letter of December 14, 1997, and Sullivan-Schein's subsequent adverse actions against her.

Ms. C. has produced no direct evidence of a causal connection between her letter of complaint and the actions Sullivan-Schein took against her. She therefore asks the Appeals Board to infer a causal connection. For the following reasons, the Appeals Board finds that no such inference is warranted.

Ms. C. maintains that her letter of December 14, 1997, sparked Sullivan-Schein's alleged retaliation. However, the letter dealt with events several years in the past that took place at a different company. Although the two individuals identified in Ms. C.'s letter had become employees of Sullivan-Schein, they were not in positions of any substantial authority. When Sullivan-Schein received Ms. C.'s letter, it took prompt and appropriate action to prevent any future problems. These facts are inconsistent with the proposition that Ms. C.'s letter was a motivating factor for Sullivan-Schein's subsequent actions against her.

The Appeals Board also finds it significant that the complaints about Ms. C.'s dealings with customers, which resulted in disciplinary action being taken against her, came from co-workers who knew nothing about Ms. C.'s letter of December 14, 1997. The Appeals Board accepts the possibility that these co-workers misunderstood or misinterpreted the nature of Ms. C.'s dealings with customers and that their complaints were in error. However, even if the co-workers were wrong, they believed at the time they made their complaints that Ms. C. had violated rules of

conduct.

The Appeals Board is persuaded that Sullivan-Schein management likewise believed that Ms. C. had violated rules of conduct when it took action against her. Mr. Engel's letter of reprimand followed two separate complaints, lodged by experienced co-workers, that Ms. C. had interfered with the co-workers' established relationships with their clients. Ms. C.'s termination followed a third complaint that Ms. C. had antagonized another customer. The Appeals Board finds that Sullivan-Schein believed these complaints to be true and acted on that belief in disciplining and terminating Ms. C..

While the Appeals Board is persuaded that Sullivan-Schein did, in fact, believe the complaints against Ms. C. to be true, it is certainly possible to fault Sullivan-Schein for failing to investigate the allegations more thoroughly. However, Sullivan-Schein's failure must be viewed in the context of the times in which it occurred. By all accounts, the merger was chaotic. One of the great problems facing Sullivan-Schein was the integration of two sales forces into one sales group. That challenge existed not only in Salt Lake, but in other locations as well. Mr. Schuetzow, Ms. C.'s direct manager, was responsible for Sullivan-Schein's sales activities in Washington, Oregon, Idaho, Montana and Utah. He was neither based in Salt Lake nor focusing solely on Salt Lake. Mr. Engel had even larger responsibilities. Consequently, Sullivan-Schein's failure to investigate the details of complaints made against Ms. C. is most reasonably attributable to 1) wide-ranging responsibilities of Sullivan-Schein's managers; 2) disorganization and confusion engendered by the merger; 3) the company's paramount concern for the continuity of its newly combined sales force; and 4) the repetitive nature of the complaints about Ms. C.'s conduct.

In summary, the Appeals Board concludes that Sullivan-Schein reprimanded and then discharged Ms. C. because it believed she had violated company standards for sales representative conduct. The Appeals Board finds no sufficient basis to infer any causal connection between Ms. C.'s complaint of December 17, 1997, and Sullivan-Schein's actions against Ms. C.. Consequently, Sullivan-Schein's actions did not violate the Utah Antidiscrimination Act and Sullivan-Schein is not liable to Ms. C. for any damages.[1]

ORDER

Having concluded that Sullivan-Schein did not unlawfully retaliate against Ms. C., the Appeals Board sets aside Judge La Jeunesse's decision and dismisses Ms. C.'s complaint with prejudice. It is so ordered.

Dated this 31st day of May, 2005.

Colleen S. Colton, Chair
Patricia S. Drawe

DISSENT

I dissent. Although I agree with the majority's legal opinion that the Appeal Board is "the ultimate fact finder," unlike the majority I would affirm Judge La Jeunesse's findings of fact.[2] The majority's opinion is wrong on both the facts and the law.

The case law which has developed since the sentinel case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is quite clear; a finder of fact may use that the proffered justification by an employer for an adverse employment action may be false as evidence of causation in the prima facie case in an employment discrimination action. The majority dismisses this legal point and fails to even discuss the Tenth Circuit Court of Appeals opinion, cited by the Petitioner in her brief, which is directly on point. In Wells v. Colorado Department of Transportation, 325 F. 3d 1205 (10th Cir., 2003), the Court held:

> We understand that by considering an employer's proffered reasons for taking adverse action in the causal-connection portion of the prima facie case, we are assessing pretext evidence that it typically considered in a later phase of the *McDonnell Douglas* analysis. But, we agree with the Third Circuit that evidence of pretext can be useful in multiple stages of a Title VII retaliation claim. *See Farrell v. Planters Lifesavers Co.,* 206 F. 3d 271 (3rd Cir. 2000). The *Farrell* court wrote:
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> "We recognize that by acknowledging that evidence in the causal chain can include more than demonstrative acts of antagonism or acts actually reflecting animus, we may possibly conflate the test for causation under the prima facie case with that for pretext. But perhaps that is inherent in the nature of the two questions being asked – which are quite similar. The questions: "Did her firing result from her rejection of his advance?" is not easily distinguishable from the question: "Was the explanation given for her firing the real reason?" Both should permit permissible inferences to be drawn in order to be answered. As our cases have recognized, almost in passing, evidence supporting the prima facie case is often helpful in the pretext stage and nothing about the *McDonnell Douglas* formula requires us to ration the evidence that can be probative of a causal link any more than the courts have limited the type of evidence that can be used to demonstrate pretext."

By ignoring the above quoted law, the majority has erased from the Labor Commission's findings the substantial evidence, which Judge La Jeunesse found compelling, that Sullivan-Schein had created a fabric of lies as to why Ms. C. was fired.

The majority's justification for rewriting the facts in this matter seem to rest solely upon the belief that because Sullivan-Schein was going through, what everyone recognizes, a difficult merger, Sullivan-Schein must have been acting in good faith when it terminated the employment of Ms. C.. I believe a more rational and realistic review of the evidence is that Sullivan-Schein can not be allowed to use the cover of a difficult business merger as an excuse to justify the inappropriate retaliatory firing of Ms. C. who had engaged in a protected activity.

Accepted as modified above, I would affirm the ALJ's findings and conclusion.

Joseph E. Hatch

1. We agree with the dissent that, if an employer presents a false reason for its action against an employee, the trier of fact may infer from the false explanation that the employer actually was motivated by an unlawful purpose. But because we have found that Sullivan-Schein's explanation of its reason for discharging Ms. C. was neither untrue nor unlawful, no inference of unlawful purpose arises in this case.

2. It is quite possible that upon a detailed review of the damages portion of the ALJ's finding, I would roll back the award of damages. However, because of the majority's decision, a detailed review of the facts support an award of damages has been rendered moot.